Supreme Court, U. S.
FILED
JAN 31 1978
MICHAEL RODAK, JR., CLERK

No. 77-645

In the Supreme Court of the United States

OCTOBER TERM, 1977

DER-RONG CHOUR, PETITIONER

v.

BENEDICT J. FERRO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ETC., AND IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 1

Question presented 1

Statement 2

Argument 6

Conclusion 12

CITATIONS

Cases:

Alesi v. *Cornell*, 250 F. 2d 877 ..... 9, 11

Ballenilla-Gonzalez v. *Immigration and Naturalization Service*, 546 F. 2d 515 10

Castaneda-Delgado v. *Immigration and Naturalization Service*, 525 F. 2d 1295 ..... 9, 10

Chavez-Raya v. *Immigration and Naturalization Service*, 519 F. 2d 397 8

Corniel-Rodriguez v. *Immigration and Naturalization Service*, 532 F. 2d 301 9

Couto v. *Shaughnessy*, 218 F. 2d 758 9

DeSouza v. *Barber*, 263 F. 2d 470 9

Mealha v. *Shaughnessy*, 219 F. 2d 600 9

Swartz v. *Rogers*, 254 F. 2d 338, certiorari denied, 357 U.S. 928 10

United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 9

Page

Cases—(continued):

United States ex rel. Dentico v. *Esperdy*, 280 F. 2d 71 9

United States ex rel. Sollazzo v. *Esperdy*, 187 F. Supp. 753, affirmed, 285 F. 2d 341, certiorari denied, 366 U.S. 905 9

Yiu Fong Cheung v. *Immigration and Naturalization Service*, 418 F. 2d 460 9

Statute and regulations:

Immigration and Nationality Act, as amended, 79 Stat. 913, 8 U.S.C. 1153(a)(2) 10

8 C.F.R. 242.15 .....6, 7

8 C.F.R. 242.16(a) 6, 8

8 C.F.R. 242.19(b) 7, 11

8 C.F.R. 242.21 11

8 C.F.R. 244.2 10

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. 8a-9a).

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1977. The petition for a writ of certiorari was filed on November 1, 1977. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the proceedings leading to the order for petitioner's deportation denied petitioner due process of law.

STATEMENT

Petitioner is a citizen of the Republic of China on Taiwan. On February 10, 1974, while a resident of Taiwan, he was admitted to the United States at Baltimore as a non-immigrant crewman authorized to remain in this country for no more than 29 days (AR 129-130).[1] Petitioner neither departed by the 29th day nor obtained an extension, and he was arrested in Great Barrington, Massachusetts, on July 17, 1974 (AR 89). On July 18, 1974, the Immigration and Naturalization Service ("the Service") initiated deportation proceedings against petitioner. The order to show cause (AR 89, 136), which was read and explained to petitioner in his native language when it was served, informed him that a deportation hearing would be held in Boston on August 9, 1974, to determine whether he was deportable for overstaying his non-immigrant visa. The reverse side of the order advised petitioner of his right to be represented by retained counsel, his right to present evidence on his own behalf, and his right to examine the evidence against him and to cross-examine witnesses presented by the Service (AR 134-136).

Petitioner was released on bail and his deportation hearing was subsequently rescheduled for September 4, 1974, in New York City. At the hearing the immigration judge, after confirming that petitioner understood the interpreter provided by the Service, asked petitioner whether he understood that "[t]his hearing is to find out whether or not you are deportable and if you are then what must be done in your case." Petitioner said that he understood (AR 129).

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[1]"AR" refers to the administrative record filed in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

The judge then informed petitioner of his right to have retained counsel represent him at the hearing. Two transcripts of the hearing were prepared because the first one was not received by the Service after being mailed by the transcriber (Pet. 5), and there is a discrepancy between the transcripts with respect to the language used by the judge at this point. The first transcript reports the judge's words as follows (AR 129):

> You have a right to have a lawyer or other representative of your own selection without cost to the Government. However, you are not required[,] you are not *forced* to have such a person, you can go ahead without one and speak for yourself, if you prefer. What will you do about having or not having such a person? [Emphasis added.]

The second transcript reads (AR 109):

> You have a right to have a lawyer or other authorized representative of your own selection but without cost to the government. However, you are not required, you are not *authorized* to have such a person, you can go ahead without one and speak for yourself as you prefer. What will you do about having or not have [*sic*] such a person? [Emphasis added.]

The transcriber stated in an affidavit (Pet. 5; AR 128) that the discrepancy was "the result of interfering sounds on the [recording] belt which made some words difficult to immediately understand." Both transcripts show that petitioner responded, "I will speak for myself" (AR 129).

In response to the judge's questions, petitioner admitted (AR 129-130) that he was not a United States citizen, that in February 1974 he had entered the United States with permission to stay no longer than 29 days, and that he remained longer than 29 days without permission. Petitioner then indicated that he desired to leave the

country voluntarily, and the judge gave him one month to do so. The judge directed that if petitioner did not depart voluntarily, he was to be deported to Taiwan (AR 130-131). The judge's decision (Pet. App. 1a-2a; AR 133) was read to petitioner (AR 132), who waived appeal (AR 133).

Petitioner did not leave the country within the allotted month, and on November 20, 1974, pursuant to the decision of the immigration judge, the Service issued a warrant for his deportation (AR 93). The Service attempted to notify petitioner to prepare for deportation to Taiwan on December 12, 1974, but he had absconded (AR 94-96). Petitioner remained at large until June 6, 1977, when he was apprehended by the Service in Albany, New York (AR 97).

On June 10, 1977, petitioner sought a writ of habeas corpus in the United States District Court for the Northern District of New York (AR 64-69). The district court stayed deportation until a scheduled hearing on June 29, 1977 (AR 70-71). Meanwhile, on June 20, 1977, petitioner filed with the Service a motion to reopen the deportation proceedings (AR 119-120). This motion was denied on June 27, 1977 (AR 114).

On June 29, 1977, following a hearing (AR 3 *et seq.*), the district court denied the habeas corpus petition on the ground that petitioner had not exhausted his administrative remedies by appealing the denial of the motion to reopen the deportation proceedings (Pet. App. 3a-4a; AR 40).

Petitioner then appealed the June 27 order denying the motion to reopen. On July 14, 1977, the Board of Immigration Appeals dismissed the appeal (Pet. App. 5a-7a; AR 44-45) on the following grounds:

> Although the respondent was not represented by an attorney at the September 4, 1974 hearing, we are convinced that he effectively waived his right to counsel at the hearing. See *Barthold* v. *INS*, 517 F. 2d 689 (5 Cir. 1975); *Tupacyupanqui-Martin* v. *INS*, 447 F. 2d 603 (7 Cir. 1971). Although the respondent was not then advised of his right to cross-examine witnesses against him as required by the regulations, in view of the fact that the finding of deportability was based upon his own admissions at the hearing and he was granted the only discretionary relief available to him, the error was harmless. We are satisfied that the conduct of the September 4, 1974 hearing was not of such a nature as to vitiate the finding of deportability. See *Mealha* v. *Shaughnessy*, 219 F. 2d 600 (2 Cir. 1955).

Petitioner then filed in the court of appeals both an appeal from the district court order denying the petition for a writ of habeas corpus and a petition for review of the decision of the Board of Immigration Appeals. Following oral argument on October 12, 1977, the court of appeals, ruling from the bench, affirmed the district court order, denied the petition for review, and directed that the mandate issue immediately (Pet. 2-3; Pet. App. 8a-9a). On October 13, 1977, the Service directed petitioner to appear on October 19, 1977, in Buffalo, New York, for deportation to Taiwan.

Following the refusal by the court of appeals to stay deportation, petitioner filed in this Court an application for a stay of deportation (No. A-358). On October 19, 1977, Mr. Justice Marshall stayed deportation "pending the filing of a response to the application for stay and further order * * *." (Pet. App. 11a). On November 14, 1977, after a response was filed, Mr. Justice Marshall vacated the October 19, 1977, order and denied the application for a stay. On November 15, 1977, Mr. Justice Brennan denied a further request for a stay. Since then, petitioner has filed another petition to reopen his

deportation proceedings, which is pending before the Board of Immigration Appeals. Petitioner has not yet been deported.

ARGUMENT

Petitioner contends that his 1974 deportation proceeding did not meet the requirements of due process, a claim he rests mainly on alleged failures by the Service to comply with its own regulations. Petitioner contends (1) that the discrepancies between the two transcripts show that there is no accurate record of the deportation proceeding (Pet. 5-6, 21-22);[2] that he was not clearly informed of his right to be represented at the hearing by retained counsel (Pet. 7-8, 22-26);[3] (3) that he was not informed of his right to object to evidence against him, to present evidence on his own behalf, and to cross-examine opposing witnesses (Pet. 9);[4] and (4) that he was not

[2]8 C.F.R. 242.15 provides in pertinent part:

> The hearing shall be recorded verbatim except for statements made off the record * * *.

[3]8 C.F.R. 242.16(a) provides in pertinent part:

> The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation * * *.

[4]8 C.F.R. 242.16(a) provides in pertinent part:

> The special inquiry officer shall * * * advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government * * *.

given a notice-of-appeal form or advised of his right to appeal to the Board of Immigration Appeals (Pet. 11-12).[5] These claims are without merit.

1. The deportation hearing was recorded verbatim, and the original recording remains in existence.[6] Thus, the requirement of 8 C.F.R. 242.15 (n. 2, *supra*) has been satisfied. It is unfortunate that the recording is not of the highest quality and that there are discrepancies between the two transcripts, but this does not amount to a violation of either the regulation or due process. The only material variation between the transcripts concerns the language the judge used in advising petitioner of his right to be represented by retained counsel.

Both transcripts (see p. 3, *supra*) reflect that the judge advised petitioner that he had "a right to have a lawyer or other representative of [his] own selection * * *." The judge then informed petitioner that he was not "required"—and not "forced" or "authorized," depending on the version—to have such a representative. As a practical matter it is unlikely that the judge said "authorized," since this would have been not only contrary to law but contrary to what the judge had said in the immediately preceding sentence. Indeed, to accept petitioner's contention is to assume not only that the

[5]8 C.F.R. 242.19(b) provides in pertinent part:

> Unless appeal from the decision is waived, the respondent shall be furnished with Notice of Appeal, Form I-290A, and advised of the provisions of §242.21 [concerning procedures to be followed on appeal].

[6]In its brief in the court of appeals, the government offered to provide the original tape so that the court could verify the transcript and the translation (Gov't Br. 6 n. 9).

judge misspoke, but that the official interpreter repeated the contradiction without question, and that petitioner in turn raised no question with the interpreter about the contradiction.[7]

But even assuming that the judge misspoke, petitioner's contention that he was not advised of his right to counsel is without merit. The judge clearly advised petitioner of his right to counsel in the immediately preceding sentence, and the use of the word "authorized," given its context in the explanation as a whole, would not ordinarily be understood as revoking the right that had just been extended. Any doubt in this regard is removed by the next sentence, in which the judge asked, "What will you do about having or not [having] such a person?" Petitioner's response, "I will speak for myself," shows that he understood that he had the right to the presence of counsel.[8]

2. At the deportation hearing before the immigration judge, petitioner apparently was not informed of his right to cross-examine government witnesses, to object to evidence against him, and to present evidence on his own behalf. This failure to comply fully with the requirements of 8 C.F.R. 242.16(a) (n. 4, *supra*) does not establish

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[7]As the court of appeals was informed (Gov't Br. 6 n. 9), the United States Attorney's office had an independent interpreter examine both transcripts and the tape to determine, not only which transcript was correct, but which represented the correct translation of what was said to applicant at the hearing. This interpreter advised that the first transcript was substantially correct in all significant respects (*ibid.*).

[8]Petitioner refers (Pet. 24) to a "right to appointed counsel." There is, however, no right to appointed counsel in deportation proceedings, which are civil, not criminal, in nature. *E.g., Chavez-Raya* v. *Immigration and Naturalization Service*, 519 F. 2d 397, 400-401 (C.A. 7); see 8 C.F.R. 242.16(a).

that petitioner was denied due process. To attack the proceeding sucessfully, the deportee must show that he was prejudiced by the error. As the court of appeals observed in *Mealha* v. *Shaughnessy*, 219 F. 2d 600, 602 (C.A. 2):

> If [the] supposed invasion [of constitutional rights] could in no way have contributed to elicit those facts on which the legality of * * * deportation depended, it is irrelevant. To hold otherwise would be to hold that [the deportee] got a right of residence which the law denied him because he was denied the right to dispute what was incontestably proved by evidence adduced without any shadow of illegality.

See also *Corniel-Rodriguez* v. *Immigration and Naturalization Service*, 532 F. 2d 301, 307 n. 18 (C.A. 2); *Yiu Fong Cheung* v. *Immigration and Naturalization Service*, 418 F. 2d 460, 464 (C.A.D.C.); *United States ex rel. Sollazzo* v. *Esperdy*, 187 F. Supp. 753, 755 (S.D.N.Y.) affirmed, 285 F. 2d 341 (C.A. 2), certiorari denied, 366 U.S. 905; *United States ex rel. Dentico* v. *Esperdy*, 280 F. 2d 71, 73 (C.A. 2); *DeSouza* v. *Barber*, 263 F. 2d 470, 475-476 (C.A. 9); *Alesi* v. *Cornell*, 250 F. 2d 877 (C.A. 9); *Couto* v. *Shaughnessy*, 218 F. 2d 758, 760 (C.A. 2).[9]

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[9]*United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, relied on by petitioner (Pet. 19-20), does not hold to the contrary. There it was held that allegations in a habeas corpus petition that the Board of Immigration Appeals had failed to comply with regulations governing the exercise of its discretion in disposing of an application for suspension of deportation entitled the applicant to a hearing. Since the applicant there was apparently statutorily eligible for a suspension of deportation, the failure by the Board to exercise its discretion clearly prejudiced him.

In *Castaneda-Delgado* v. *Immigration and Naturalization Service*, 525 F. 2d 1295 (C.A. 7), also relied on by petitioner (Pet. 14. 22-25), the court held that depriving a deportee of his right to counsel after

Although petitioner repeatedly suggests that he might have avoided deportation if he had been aware of the right to cross-examine witnesses, present evidence, and object to evidence against him, he has to this day failed to come forth with any showing that he was not deportable in 1974 or that he is not deportable today. At the hearing he admitted, and he has never since denied, that he entered the United States as a crewman and that he overstayed the period within which he was authorized to remain. Petitioner is therefore deportable.[10] Since the government at the deportation hearing offered no evidence other than the petitioner's own admissions, and

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he had elected to exercise that right entitled him to have the order of deportation vacated, regardless of whether he was prejudiced by the absence of counsel. The decision rested on the importance of the right to have retained counsel present, and did not hold that every noncompliance with regulations in deportation proceedings constitutes grounds for vacating the deportation order. Since petitioner waived his right to counsel (see Part 1, *supra*), *Castaneda-Delgado* is of no help to him.

[10]Contrary to his assertion (Pet. 12, 26-27), petitioner's marriage in September, 1977, to a permanent resident of the United States (Pet. 12) confers on him no right to avoid deportation. *Swartz* v. *Rogers*, 254 F. 2d 338, 339 (C.A.D.C.), certiorari denied, 357 U.S. 928. He is only entitled to a "second preference" for issuance of an immigrant visa. Section 203(a)(2) of the Immigration and Nationality Act, as amended, 79 Stat. 913, 8 U.S.C. 1153(a)(2). Petitioner has filed a petition with the Service for administrative relief.

In some cases in which alien crewmen under deportation orders have shown that they are married to citizens or resident aliens, the district director has reinstated or extended the time for voluntary departure, pending disposition of the application for a visa. See 8 C.F.R. 244.2; *Ballenilla-Gonzalez* v. *Immigration and Naturalization Service*, 546 F. 2d 515, 522 (C.A. 2). This is apparently the procedure to which petitioner refers (Pet. 26-27). The decision whether to provide such administrative relief is for the Service, however, and as petitioner states (Pet. 26), "respondents are at this very moment evaluating petitioner's eligibility for such adjustments."

since petitioner has never shown that he could have offered any evidence which could have prevented a finding of deportability, he suffered no denial of due process by reason of the failure to advise him that he could cross-examine witnesses and present and object to evidence. Like *Alesi* v. *Cornell, supra*, 250 F. 2d at 879, this is a case in which petitioner "[a]t no time, at any hearing, nor in any brief, nor by motion to reopen * * * nor here, has * * * challenged the fact of his deportability, nor indicated any substantive deficiency in the government's case. Nowhere has [he] urged any prejudice resulted to him from any alleged error. He disagrees only with the final result" (footnote omitted).

3. Because petitioner waived his right to appeal, he was not entitled under 8 C.F.R. 242.19(b) (n. 5, *supra*) to be provided with a notice-of-appeal form or to be advised of the provisions of 8 C.F.R. 242.21 regarding appeal procedures. In any event, he has had the equivalent of an appeal in the form of the proceedings on his motion to reopen his deportation proceedings. Every argument he has made has been fully considered by the Board of Immigration Appeals and the court of appeals and has correctly been found to be without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1978.

DOJ-1978-01